UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

IRENE MANN, Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	)	DOCKET NUMBER SF-0752-96-0657-I-2 DATE: MAR 9, 1998

Andrew Schwartz, Esquire, Los Angeles, California, for the appellant.

Andrew Rudyk, Esquire, Brooklyn, New York, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that affirmed the agency's removal action, and the agency has cross-petitioned for review of the same initial decision. For the following reasons, we GRANT both petitions and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, MITIGATING the removal to a sixty-day suspension.

BACKGROUND

Effective May 31, 1996, the agency removed the appellant from her GS-7 Purchasing Agent position with the Food and Drug Administration based on the following reasons: (1) Engaging in dishonest conduct in violation of 5 C.F.R. § 2635.101; (2) violating the agency's standards of ethical conduct (45 C.F.R. § 73.735-302(d)) by obstructing an Office of Internal Affairs investigation through the giving of false testimony under oath; (3) using her public office for private gain in violation of 5 C.F.R. § 2635.702; and (4) converting United States Government property in violation of 18 U.S.C. § 641. Initial Appeal File (IAF), Tab 3, Subtabs 4a, 4b, and 4e. The agency set forth four specifications in support of reason (1), and one specification in support of each of the three other reasons. *See id*., Subtab 4e. Each of the reasons relate to the appellant's December 1, 1995 use, for personal business, of a Federal Express envelope and a preprinted airbill that contained the agency's Federal Express account number. *See id*., Subtab 4e.

The appellant timely filed an appeal, *see* IAF, Tab 1; Remand Appeal File (RAF), Tab 1, and asserted that the agency's action was based on reprisal for filing equal employment opportunity complaints, race and disability discrimination, and retaliation for whistleblowing, *see* RAF, Tab 6. After a hearing, the administrative judge (AJ) sustained reasons (1) and (3),[1] did not sustain reasons (2) and (4), found that the appellant did not prove her affirmative defenses, found that a relationship existed between the sustained reasons and the efficiency of the service, and found that the penalty of removal was reasonable.

The appellant has filed a timely petition for review of the initial decision. The agency has filed a timely response opposing the petition for review and asserting that the AJ erred when she did not sustain reason (4).

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[1] The AJ sustained only specifications (1) and (2) of reason (1). RAF, Tab 9 at 3-6.

ANALYSIS

We agree with the AJ's finding that the appellant committed the underlying acts at issue in this appeal, namely, use of a Federal Express envelope and airbill that contained the agency's Federal Express account number in an unsuccessful attempt to send documents of a personal nature, and placement of incorrect sender and recipient information on the airbill. The appellant admitted to these acts. IAF, Tab 3, Subtabs 4c at 2-5, and 4e at 17, 54. We address below whether the agency has proven the charges that are based on these acts.

The AJ should have sustained reason (4), but not reason (3).

In its cross-petition for review, the agency claims that the AJ erred when she found that reason (4), violation of 18 U.S.C. § 641, could not be sustained because it was based on the same incident at issue in reason (3), use of public office for private gain in violation of 5 C.F.R. § 2635.702, and therefore was "unnecessarily duplicative." The agency correctly asserts that the AJ did not support this conclusion with reference to any case law.

We agree with the agency that the AJ erred in this regard. The AJ should not have found that the charge was *not sustained* because it was duplicative. Although the Board has, as set forth below, held at times that so-called duplicative charges "merge" into other charges, it has not intended to hold that a merged charge is, by its very merger, not sustained.

In addition, the AJ should not have merged reasons (3) and (4), assuming that she intended to merge them. The Board has "merged" a separate charge such as conduct unbecoming a Federal employee, into a more specific charge, such as falsification or AWOL. Such merger has been held appropriate when the agency "did not accuse the appellant of any specific misconduct under the unacceptable conduct charge in addition to its ... allegations" of misconduct underlying the more specific charge. *See Gunn v. U.S. Postal Service*, 63 M.S.P.R. 513, 516-17 (1994) (merging a charge of unacceptable conduct in violation of the agency's

Employee and Labor Relations Manual (ELRM) into a charge of falsification of a leave form); *Wolak v. Department of the Army*, 53 M.S.P.R. 251, 261 (1992) (the AJ should have merged a conduct unbecoming charge into charges of misuse of government time and property and providing false statements and impeding an investigation). Charges have also been merged when one charge is really a "continuation" of the other. *See Barcia v. Department of the Army*, 47 M.S.P.R. 423, 429-30 (1991) (merging a charge of use government property for other than official purposes with a charge of violation of administrative rules and regulations, where the charges were supported by the same specification and the second charge was a continuation of the first charge, i.e., the agency was charging the appellant with violating its rules and regulations by using government property for other than official purposes); *Best v. Department of the Navy*, 41 M.S.P.R. 124, 128 (1989) (the AJ correctly considered as one charge - purchasing cocaine on the agency's premises in violation of Sections 661.53, 661.55, and 666.2 of the ELRM - separate charges of purchasing cocaine and violating those sections of the ELRM where they were based on the same act of misconduct).

The Board has also merged charges when separate charges (that are not general charges such as conduct unbecoming) "are based on the same incident and involve essentially the same misconduct." *Delgado v. Department of the Air Force*, 36 M.S.P.R. 685, 688 (1988) (merging separate charges of destruction of government property and unauthorized use of bolt cutters, and merging separate charges of leaving the job without permission and absence without leave, where each pair of charges was based on the same incident and involved essentially the same misconduct); *see Ruffin v. Department of the Army*, 35 M.S.P.R. 499, 502-03 (1987) (merging separate charges of insubordination and being disrespectful by using inflammatory language to a supervisor, where they were "based on identical specifications and evidence"), *aff'd*, 852 F.2d 1293 (Fed. Cir. 1988) (Table). The key reason for merger in these two cases, however, appears to be that when the

charges are based on the same act of misconduct, proof of the act of misconduct automatically constitutes proof of both charges. Where proof of a single act of misconduct does not automatically result in proof of multiple charges, the Board has not merged the charges. *Walker v. Department of the Navy*, 59 M.S.P.R. 309, 318 (1993) (where the agency brought separate charges of sexual harassment and disgraceful conduct based on the same act of misconduct, and the proven act did not constitute proof of sexual harassment, the Board found that it did constitute disgraceful conduct because a single set of actions can support more than one charge, as long as the charges entail different elements of proof); *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 497-98 (1991) (where the agency brought three separate charges of: Conduct unbecoming an employee; violation of the agency's policy on sexual harassment; and unreasonably interfering with employees' work performance and/or creating an intimidating, hostile, and/or offensive work environment, all based on the same proven act of misconduct, the Board found, where the latter two charges were not proven, that the charges "are not interdependent upon each other and each can stand alone as a separate charge").

Here, although reasons (3) and (4) are based on the same proven act of misconduct, namely, the appellant's personal use of a Federal Express airbill containing the agency's Federal Express account number, merger is not appropriate under *Gunn* or *Barcia* because reason (4) is not a conduct unbecoming-type charge, nor is it a "continuation" of reason (3). Moreover, *Delgado* does not warrant merger of reasons (3) and (4) because proof of the underlying act of misconduct does not, as set forth below, automatically mean that both reason (3) and reason (4) have been proven.

The appellant stipulated that she had control and custody over Federal Express airbills that were preprinted for use by the agency for sending official business correspondence and other material. RAF, Tabs 4 and 6. Thus, under reason (3), the appellant used her "public office" when she used one of the

agency's preprinted Federal Express airbills for personal business. Nevertheless, the agency has not shown that the appellant obtained any "private gain" from the transaction. The package the appellant deposited with Federal Express did not reach its intended destination. Rather, because of conflicting address information provided on the airbill by the appellant, the package was returned to the agency and the appellant's supervisor several days later. Although the parties stipulated that Federal Express airbills, when completed, obligated the agency to pay for the delivery service provided by Federal Express, RAF, Tabs 4 and 6, there was arguably no delivery service provided here because the package was returned to the agency. The agency has not shown that it was billed for the package,[2] and there is no dispute that the appellant eventually paid Federal Express $13.00 for the package.

A charge of using one's public office for private gain cannot be sustained when no private gain has been shown. *See Burkett v. General Services Administration*, 27 M.S.P.R. 119, 121-22 (1985) (the agency was not required to show gain, and proved its charge of *attempted* use of public office for private gain, where it established that a Building Manager, using her position in the government, ordered, but later canceled or returned, building materials that she intended to use to restore a personal residence); *Burnett v. U.S. Soldiers' & Airmen's Home*, 13 M.S.P.R. 311, 313-15 (1982) (where no actual gain was proven, the agency was only able to prove its charge of creating the appearance of using public office for private gain). Thus, the proven facts in this appeal do not result in the agency having met its burden of proving reason (3). Reason (3) is therefore not sustained, and reason (3) and reason (4) do not merge.

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[2] The appellant's second-line supervisor testified that he obtained a list from the agency's headquarters of the Federal Express billings for a six month period, in part to see whether the package in question was on such a list. HT at 19-20. He did not, however, testify that the package in question was billed to the agency.

The agency contends that the AJ also erred when she found, in the alternative, that reason (4) could not be sustained because of the de minimis amount involved ($13.00), the appellant's one-time use of the airbill, and unspecified "circumstances surrounding the incident." Contrary to the AJ's alternative finding, however, there is no de minimis monetary threshold that prevents the Board from sustaining a violation of section 641. Rather, the statute provides that, if the value of the property converted does not exceed the sum of $100.00, violators shall be fined not more than $1,000.00 or imprisoned not more than one year, or both. 18 U.S.C. § 641. The appellant's one-time use of the airbill and the circumstances surrounding the incident do not preclude a finding that she violated the statute if the elements of the statutory prohibition are otherwise met.

Section 641 makes it unlawful to knowingly convert to one's use any thing of value of the United States or of a department or agency thereof. Conversion under section 641 may be consummated without any intent to keep, and includes misuse or abuse of a thing of value, or use in an unauthorized manner or to an unauthorized extent. *Heath v. Department of Transportation*, 64 M.S.P.R. 638, 645 (1994). A knowing conversion requires more than knowledge that the defendant was taking the property into his possession; he must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. *Id*. at 646. Conversion under section 641 does require proof of a serious violation of the government's right to control the use of its property. *Id*.

Although we found it unnecessary to address the issue in *Heath*, 64 M.S.P.R. at 644, we now find that the term "thing of value" includes intangibles, such as the agency's Federal Express account number in this appeal. *See, e.g., United States v. Croft*, 750 F.2d 1354, 1360-61 (7th Cir. 1984) (the broad scope of 18 U.S.C. § 641, as analyzed by the Supreme Court in *Morissette v. United States*, 342 U.S. 246 (1952), has been interpreted by the Federal circuits

to include the knowing conversion of intangible "things of value," such as the services of a student assigned to undertake research, and information contained on a computer disk).[3] As the agency asserted below, the account number is a thing of value because it authorizes payment by the United States for a service performed by Federal Express. IAF, Tab 3, Subtab 4e at 7. Because the agency exercised control over the use of its Federal Express account number, it was a thing of value "of the agency." *Cf. United States v. Scott*, 784 F.2d 787, 791 (7th Cir. 1986) (in determining if stolen funds are things of value of the United States under 18 U.S.C. § 641, the key factor is whether the Federal government still maintained supervision and control over the funds when they were stolen).

The facts and circumstances surrounding the appellant's actions in using the agency's Federal Express airbill support a finding that she had the requisite intent under section 641. The appellant testified that a co-worker told her before she mailed the package that it would be billed to the government, and the appellant admitted that she intended to write a personal check to cover it, but did not do so before mailing the package. *See* Hearing Transcript (HT) at 195-96. Thus, the appellant used the agency's Federal Express account number for personal business with knowledge that such use was improper. The appellant's alleged intent to repay the $13.00 cost of the airbill at an undetermined time in the future does not negate a finding of dishonest conduct on December 1, 1995, based on her use of the airbill with knowledge that such use was improper. Not only was the

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[3] For the reasons set forth in *Croft*, 750 F.2d at 1359-62, we reject the reasoning of the U.S. Court of Appeals for the Ninth Circuit in *Chappell v. United States*, 270 F.2d 274, 276-78 (9th Cir. 1959), that the term "thing of value" does not include intangibles. In addition, we note that the agency did not allege, in its specification underlying reason (4), that the Federal Express envelope and/or the airbill was a thing of value of the United States. IAF, Tab 3, Subtab 4e at 7. Accordingly, we do not address that issue. *Gottlieb v. Veterans Administration*,

appellant's action unauthorized, but it constituted a serious violation of the agency's right to control the use of its Federal Express account number. *See Heath*, 64 M.S.P.R. at 646. We therefore find that the agency proved the elements necessary to sustain reason (4).

As the AJ found, reason (1), specification (2) is sustained.

As previously noted, the AJ sustained only specifications (1) and (2) of reason (1). On review, the appellant challenges the AJ's findings with respect to both specifications. Because, however, we find that the AJ correctly sustained specification (2), and therefore correctly sustained reason (1), *see Stein v. U.S. Postal Service*, 57 M.S.P.R. 434, 438 (1993) (proof of only one specification supporting a charge is sufficient to sustain the charge), we need not review her findings with respect to specification (1).

Under specification (2), the agency essentially alleged that the appellant engaged in dishonest conduct in violation of 5 C.F.R. § 2635.101 when she used a name by which she was not known at work and other incorrect information in preparing the airbill. *See* IAF, Tab 3, Subtab 4e at 4. The appellant used her married name, "Kelly," as the "sender" of the airbill, rather than "Mann," the name by which she was known at work. IAF, Tab 3, Subtab 4e at 26. She also used a fictitious name ("Douglas Richar" at "Richar Supply Company") for the intended recipient of the package, attorney Douglas Richard, and inserted "New Jersey" on the line for "city" and "state," while including the correct street address and zip code on the airbill for the street in St. Louis, Missouri, where Douglas Richard worked. *Id*. at 26, 84.

On review, the appellant asserts that she would not have purposely placed incorrect information on the airbill "knowing [that] if she did the FedEx could not be delivered." She also asserts, as she did below, that she used the name "Kelly"

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39 M.S.P.R. 606, 609 (1989) (the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency).

on the airbill because that was the name by which she was known to Douglas Richard, she filled the airbill out in a hurry at the end of the work day, and she wrote "Richar Supply Company" out of habit because most of the recipients of her work-related Federal Express packages were companies.

In sustaining this specification, the AJ found it more likely true than untrue that the appellant made the entries on the airbill in a dishonest manner, rather than by accident as the appellant claimed, given the appellant's nineteen years of work in the areas of supply, shipping, and receiving, which required accuracy in ordering, shipping and receiving labels, and documentation. We discern no error in this finding by the AJ. There is no evidence that the appellant knew, at the time she completed the airbill, that Federal Express packages with the correct street address and zip code, but incorrect city and state, would not be delivered to the location that was indicated by the street address and zip code. As the agency's deciding official pointed out, whether the package's airbill listed the sender as "Kelly" or "Mann" would not have had any bearing on whether the recipient received, opened, or processed the contents of the envelope, *see* HT at 100, unless of course the recipient would have returned the document unopened because of the incorrect designations "Douglas Richar" and "Richar Supply Company." Having the name "Kelly" on the airbill, the name by which the appellant was known to Douglas Richard, would ensure that, although the other information was incorrect, the document would still be opened and not returned. Although the appellant claims that she misnamed the intended recipient on the airbill because she was in a hurry and out of habit, the name of the recipient, Douglas Richard, was spelled correctly on the internal documents, namely, an envelope within the Federal Express envelope and a check made out to Mr. Richard. IAF, Tab 3, Subtab 4e at 30, 33. Based on this circumstantial evidence, we find no error in the AJ's finding that the appellant intended to place incorrect information on the airbill, apparently in an attempt to avoid detection by the agency while ensuring

that the package would be received and opened by Douglas Richard. *See Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 427 (1997) (intent may be proven by circumstantial evidence); *Vilt v. U.S. Marshals Service*, 16 M.S.P.R. 192, 199 (1983) (where a charge alleges that the appellant's conduct was dishonest, intent is a necessary element).

We also find that this dishonest conduct violated 5 C.F.R. § 2635.101(b)(1), which provides that "[p]ublic service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain." By intentionally entering incorrect information on the airbill, apparently in an attempt to avoid detection, the appellant did not place loyalty to ethical principles above her interest in private gain. Therefore, because the appellant engaged in dishonest conduct in violation of 5 C.F.R. § 2635.101(b)(1), the AJ correctly sustained specification (2) and reason (1).

The affirmative defenses are not proven.

The appellant makes general assertions on review reiterating the affirmative defenses she raised below. For example, the appellant asserts that "[t]he reason the agency proposed termination was due to the Appellant's prior whistle blowing charge against the District Director," the appellant's medical condition and race "were contributing factors to her termination," and "[t]he reasons for the termination of the Appellant were a pretext for management's discriminatory animus and in retaliation for whistle blowing." Mere disagreement with the administrative judge's findings and credibility determinations, however, does not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Therefore, the AJ's findings in this regard are not disturbed.

The penalty is mitigated.

The appellant contends that removal is too harsh, even if the AJ properly sustained two of the four reasons. In light of our determination that only reasons

(1) and (4) have been sustained, we find that the penalty of removal is not reasonable, and that the reasonable penalty is a sixty-day suspension.

Where, as here, not all of the agency's charges have been sustained, the Board will independently and responsibly balance the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), to determine a reasonable penalty. *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 527 (1996).

The sustained charges are serious. In particular, violation of a criminal statute, particularly one such as 18 U.S.C. § 641 that proscribes the knowing conversion of government property, is a very serious offense. *See Heath*, 64 M.S.P.R. at 650. The charges are related to the appellant's duties, position, and responsibilities. The appellant stipulated that, as a GS-7 Purchasing Agent, she is the technical authority in the district for procurement (purchasing), rental or leasing of supplies, equipment and services, and personal property control, and is delegated procurement authority to enter into contracts of up to $25,000.00 per transaction. RAF, Tabs 4 and 6. Further, she stipulated that she had control and custody over Federal Express airbills that are preprinted for use by the agency. *See id*. The appellant's conduct was intentional and committed for the purpose of achieving at least a temporary gain. Moreover, the appellant was on notice, at least as of May 1995, when she was formally asked by her supervisor whether she had ever used Federal Express materials for personal use, that personal use of the Federal Express account would be improper. IAF, Tab 3, Subtab 4c at 8-9.

There are, however, significant mitigating factors in this appeal. The appellant's offense was not repeated, but appears to have been an isolated incident. The appellant has nineteen years of prior Federal service, five of which she has served with the agency. IAF, Tab 3, Subtabs 4a and 4c at 2; HT at 92, 171. In addition, the amount of money involved in the incident ($13.00) was de minimis. The Board and the Court of Appeals for the Federal Circuit have held that the de minimis nature of a theft may be a significant mitigating factor where,

as in this appeal, the appellant has a satisfactory work and disciplinary record. *Banez v. Department of Defense*, 69 M.S.P.R. 642, 650 (1996); *Miguel v. Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984). The appellant testified without contradiction that the agency had no problems with her work, and that her performance evaluations were highly successful until the fall of 1995, when she received a fully successful rating. HT at 173-74, 193. The appellant has no record of discipline at the agency. HT at 92 (testimony of the deciding official). The appellant submitted letters of recommendation from co-workers regarding her honest and trustworthy character, as well as her good work performance at the agency. *See* IAF, Tab 3, Subtab 4c at 10-14.

We also note that, although the agency claims that it lost trust in the appellant's ability to accomplish her duties, it allowed the appellant to continue to perform the normal duties of her position for several months after it became aware of the offense. *See* IAF, Tab 3, Subtab 4d (April 16, 1996 letter placing the appellant on administrative leave); HT at 36-38 (testimony of the appellant's supervisor that he was not sure what duties the appellant was performing after the agency became aware of the offense, and that she was "moved" out of her position between February and April 1996), 211-13 (testimony of the appellant that she performed the same duties, and had the privilege of sending Federal Express packages, until April 1996); *Goode v. Defense Logistics Agency*, 31 M.S.P.R. 446, 450 (1986) (the agency's decision to allow the appellant to continue in his position for five months after learning of the offense was a mitigating factor where the agency claimed that it lost trust in him).

Although the agency and the AJ relied on *Sears v. Department of the Navy*, 7 M.S.P.R. 417 (1981), *aff'd*, 680 F.2d 863 (1st Cir. 1982), in support of the penalty of removal, *Sears* is distinguishable from this appeal. In *Sears*, the Board upheld the removal of a purchasing agent with twenty-five years of experience based on a sustained charge of unauthorized removal of government property

valued at less than $100.00. This was the only charge brought by the agency in *Sears*. In a case where all of the charges are sustained, the Board limits its review of the penalty selection, and will correct the agency's penalty only to the extent necessary to bring it to the maximum penalty or the outermost boundary of the range of reasonable penalties. *White*, 71 M.S.P.R. at 525. In this appeal, by contrast, two of the agency's four charges have not been sustained, and deferring to the agency's penalty determination on the basis of charges that were not sustained would involve indulging in a legal fiction, because when not all of the charges are sustained, the penalty determination made by the agency no longer stands and there is no penalty selection to review. *Id*. at 526. In such a case, as here, the Board will independently and responsibly balance the relevant *Douglas* factors to determine a reasonable penalty. *See id*. at 527. Moreover, the Board did not find in *Sears* that the value of the property removed was de minimis, as we have here. Further, the Board found in *Sears* that the agency was justified on the facts of that case in concluding that it could not trust the appellant and that his conduct would severely impair his usefulness in any position with the agency. By contrast, the agency in this appeal allowed the appellant to perform the normal duties of her position for several months before either removing some of those duties or placing her on administrative leave.

We note that the agency's deciding official testified that, if only reason (1) were sustained, he would still have removed the appellant because that charge dealt with the heart of the matter, namely, the appellant's dishonesty. HT at 102. In determining a reasonable penalty in cases where not all of the charges are sustained, the Board will consider statements by deciding officials concerning what penalties they would have imposed for the sustained charges. *White*, 71 M.S.P.R. at 527-28. Such statements may be relevant in those cases where, for example, the statements are supported by a table of penalties. *Id*. at 528. While

such statements should not be given absolute deference, they should be carefully weighed where the AJ finds the testimony of the deciding officials credible. *Id*.

Although we have carefully considered the deciding official's statement, we find that it does not require a different result in this appeal. The agency has not submitted a table of penalties that supports the deciding official's testimony that he would have imposed the penalty of removal for a first offense of dishonest conduct. Moreover, the factors set forth above warrant mitigation.

Accordingly, we find that the reasonable penalty in this appeal is a sixty-day suspension. *Cf. Goode*, 31 M.S.P.R. at 450-51 (affirming the AJ's mitigation of the appellant's removal for embezzlement in violation of 18 U.S.C. § 641 to a 90-day suspension where, among other things, the appellant had eleven years of satisfactory service with no prior disciplinary record, and the agency allowed the appellant to continue in his position for five months after learning of the offenses he committed); *Stead v. Department of the Army*, 27 M.S.P.R. 630, 632-35 (1985) (sustaining the AJ's mitigation of the appellant's removal for theft of government property to a 90-day suspension, upon finding that the agency's action of continuing the appellant in his position with unlimited access to the installation demonstrated its continuing trust in him); *Banez*, 69 M.S.P.R. at 650-51 (mitigating a removal for misappropriation of government property valued at $13.99 to a sixty-day suspension, based on the de minimis nature of the theft, the fact that it was the appellant's first offense in twenty-six years of military and civilian service, the appellant's satisfactory performance, and his lack of custody and control over the item).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute in its place a sixty-day suspension effective May 31, 1996. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee

motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.